

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMON HAJJU BARBER,

Defendant-Appellant.

UNPUBLISHED

June 4, 2013

No. 307450

Wayne Circuit Court

LC No. 11-006699-FH

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons set forth below, we affirm.

Defendant claims the trial court should have granted his motion to dismiss the charges on the ground of prearrest delay. We review this issue for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). Defendant's claim also implicates constitutional due process rights, and this Court reviews these issues de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). "The guideline is whether the record presents prejudice resulting from the delay which violates a defendant's right to procedural due process." *People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009).

Defendant argues that he was prejudiced because the delay before his arrest made it impossible for him to prepare a meaningful defense, and he had to rely on cross-examining the prosecution's witnesses. Also, defendant argues that the prosecution failed to meet its burden to show that the reason for the delay was sufficient to justify any prejudice.

Mere delay between the time of the commission of an offense and arrest is not a denial of due process. *Id.* at 237. To determine if a denial of due process occurred, we balance the actual prejudice to the defendant against the state's reasons for the delay. *People v Tanner*, 255 Mich App 369, 414; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003). It is defendant's burden to show actual and substantial prejudice to his right to a fair trial and an intent by the prosecution to gain a tactical advantage. *People v Reid (On Remand)*, 292 Mich App 508, 511-512; 810 NW2d 391 (2011); *Cain*, 238 Mich App at 108. If the defendant

demonstrates prejudice, the prosecution then has the burden to show that the reason for the delay justified the resulting prejudice. *Patton*, 285 Mich App at 237.

To be substantial, the prejudice must have “meaningfully impair[ed] the defendant’s ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected.” *Id.* Actual and substantial prejudice requires more than generalized allegations. *Id.* “An unsupported statement of prejudice by defense counsel is not enough, nor are undetailed claims of loss of physical evidence, witness memory loss, or witness death.” *People v Walker*, 276 Mich App 528, 546; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008).

In *Patton*, 285 Mich App at 230, the defendant claimed a prearrest delay denied him due process. The defendant embezzled more than \$20,000 between January 2002 and June 2002. *Id.* A criminal complaint was filed in October 2002, and a warrant was issued for his arrest, but the prosecutor was unable to locate the defendant. *Id.* at 231. The prosecutor later learned that the defendant was incarcerated in Kentucky, and filed a detainer against him in February 2006. *Id.* Authorities transferred defendant to Michigan in November 2006. *Id.* The trial court denied the defendant’s motion to dismiss, and thereafter, the defendant pleaded no contest to embezzlement. *Id.* This Court ruled that the defendant was not denied due process because of the prearrest delay. *Id.* at 237. As this Court explained:

[D]efendant only generally alleges that the prearrest delay prevented him from contacting former, unnamed coworkers because his former employer was no longer in business and its headquarters had been vacated. However, defendant does not provide any detail on the substance of any possible defense to the embezzlement charge, nor does he provide any detail regarding how his former coworkers could have supported a defense. By not identifying any specific prejudice, defendant has not established “actual and substantial” prejudice. Accordingly, defendant was not denied due process because of the prearrest delay. [*Id.*]

Here, defendant has also failed to present evidence that he sustained actual and substantial prejudice because of the delay in his arrest. It was insufficient for defendant to claim prejudice on the basis of a general assertion that he could not prepare a meaningful defense, and that he had to rely on cross-examining the prosecution’s witnesses. Actual and substantial prejudice requires more than generalized allegations. *Id.* Defendant’s argument that there was no fingerprinting on the gun, cash, or drug packages is also insufficient to show that he was prejudiced. Sergeant Willie Smith testified that fingerprinting was unnecessary because Officer Dondre Penn saw defendant toss the gun. Sergeant Smith also saw Officer Johnson search defendant and confiscate the money from defendant’s sock.

Defendant argued in his motion to dismiss that he was unable to locate material witnesses who were available before the trial court dismissed the initial charges on December 10, 2008. Defendant does not make this argument on appeal. However, it does not constitute sufficient evidence of actual and substantial prejudice. See *Patton*, 285 Mich App at 237. Defendant failed to name any material witnesses or establish that they were available in 2008, but not for

the trial in 2011. The only other witnesses to the search were defendant's nephew, godsister, and cousin. As in *Patton*, defendant did not provide any details regarding how these witnesses could have supported his defense. Therefore, defendant did not present evidence that he sustained actual and substantial prejudice and that the delay meaningfully impaired his ability to defend against the charges in such a manner that the outcome of the proceedings was likely affected.

Further, defendant failed to present evidence that the delay was an attempt by the prosecution to gain a tactical advantage. Defendant cites *People v Adams*, 232 Mich App 128, 139-140; 591 NW2d 44 (1998), and argues that a need for ongoing investigation by police is a legitimate reason for delay, but this did not explain the delay in this case. However, the fact that the delay was not premised on an ongoing investigation does not establish that the prosecutor intended to delay defendant's arrest in order to gain a tactical advantage. No evidence in the record supports such a conclusion. Accordingly, defendant has failed to show he sustained actual and substantial prejudice or that the delay was deliberate in order to secure his conviction, and the trial court correctly denied his motion to dismiss.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan